Supreme Court, U. S.
FILED
NOV 11 1975
MICHAEL RODAK, JR., CLERK

No. 75-182

In the Supreme Court of the United States

OCTOBER TERM, 1975

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

JERSEY CENTRAL POWER & LIGHT CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-182

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PETITIONER

v.

JERSEY CENTRAL POWER & LIGHT CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Under Title VII of the Civil Rights Act of 1964 and Executive Order 11246, the Attorney General, the Secretary of Labor, and other branches of the federal government have responsibility for enforcement of federal laws providing for equal employment opportunities. The resolution of the issue presented in this case will affect that enforcement responsibility.

The petition for a writ of certiorari presents the question whether, under Title VII of the Civil Rights Act of 1964, it is an unlawful employment practice for an employer, who previously engaged in hiring discrimination after the enactment of Title VII, to effect layoffs of its employees pursuant to a facially neutral company-wide seniority system, when the layoffs have a disproportionate impact on the company's minority-group employees who were hired after the employer had ceased discriminating.

The position of the Equal Employment Opportunity Commission is that layoffs on the basis of seniority in those circumstances perpetuate the prior unlawful discrimination and are therefore barred by Title VII.

Although we differ with EEOC on the merits, we agree that the issue is of substantial current importance in the administration of Title VII and that it merits review by this Court.

1. In our view, layoffs of employees in the reverse order of their seniority, if made pursuant to the terms of an otherwise *bona fide* company-wide seniority system, do not "discriminate against any individual * * * because of such individual's race" (42 U.S.C. 2000e-2(a)) but rest on the racially neutral criterion of each individual's tenure with the company. So long as no affected individual's tenure is shorter than it would have been in the absence of the employer's prior unlawful discrimination—that is, so long as each individual who was himself the subject of discrimination is restored to his rightful place in the seniority system—the layoffs are protected by Section 703 (h) of the Act, 42 U.S.C. 2000e-2(h), which provides that "it shall not be an unlawful employment practice for an employer to apply * * * different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system, * * * provided that such differences are not the result of an intention to discriminate because of race * * *."

If a particular employee was himself the victim of the company's prior unlawful hiring discrimination, then his seniority should be computed from the date when he would have been hired but for that discrimination. To subject him to layoff on the basis of his actual hiring date would perpetuate the prior unlawful discrimination against him and would not be protected by Section 703(h), because his

reduced seniority would be "the result of an intention to discriminate because of race" (*ibid.*).[1]

But the Act does not require giving black (or other minority-group) employees enhanced seniority rights on the basis of their race simply because *other* black applicants were previously denied employment on the basis of their race. Treating black employees differently for purposes of layoffs solely because they are black, when they have not themselves previously suffered individual discrimination by the employer, would amount to preferential treatment on the basis of race within the meaning of Section 703(j) of the Act, 42 U.S.C. 2000e-2(j).

2. While we thus disagree with EEOC's interpretation of the Act, we recognize that the issue it presents in its petition is of substantial importance in its current enforcement program. We believe that certiorari should be granted to resolve that issue.

Although the case was decided by the district court on a motion for summary judgment, so that the present record does not indicate whether or to what extent Jersey Central engaged in unlawful employment discrimination after the effective date of the 1964 Act, the court of appeals ruled that "proofs of this nature are without probative value in challenging a bona fide seniority system" (Pet. App. 54). Thus, the issue tendered by the petition, though presented in an abstract fashion, is ripe for review in this case, since

---

[1]The issue whether retroactive seniority credit may be granted to the identifiable victims of an employer's unlawful hiring discrimination is before this Court in *Franks* v. *Bowman Transportation Co.*, No. 74-728. We do not understand the court of appeals' opinion in this case to foreclose such seniority credit for employees who were themselves unlawfully denied employment on the basis of their race at a time prior to their actual hiring.

its resolution will affect the conduct of further litigation.[2]

---

[2]This case was initiated by Jersey Central's filing of a complaint seeking a declaration of its possibly inconsistent rights and obligations under its collective bargaining agreement with the unions, on the one hand, and, on the other hand, Title VII of the Civil Rights Act of 1964 and a conciliation agreement signed by the company, the unions, and the Commission. The district court granted partial summary judgment against Jersey Central on the ground that the conciliation agreement was inconsistent with and superseded the provisions of the collective bargaining agreement that provided for layoffs on the basis of seniority. The court of appeals held that the conciliation agreement is silent with respect to layoffs and does not affect the layoff scheme provided for in the collective bargaining agreement (Pet. App. 42-49).

The court of appeals also considered whether that scheme "*must* be modified as being contrary to [the] public policy" reflected in Title VII (*id.* at 50; emphasis in original). It concluded that "Congress did not intend that a *per se* violation of the Act occur whenever females and minority group persons are disadvantaged by reverse seniority layoffs" (*id.* at 52) and that, so long as the system "is facially neutral and was neither designed nor intended to disguise discriminatory practices" (*id.* at 55, n. 54), it "will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past [discriminatory] employment practices" (*id.* at 61).

The court of appeals contemplated further litigation in the district court in accordance with the principles stated in its opinion (see *id.* at 53, 55, n. 54, 62). We doubt that the district court could properly entertain what would amount to a Title VII suit in the context of an action for a declaratory judgment, because Title VII's enforcement scheme contemplates that litigation with respect to a particular employer's employment practices will be initiated by EEOC (or private complainants) and only after the prescribed administrative procedures—the filing of an administrative complaint, the giving of notice to the employer, the conducting of an investigation, a finding of probable cause by EEOC, and unsuccessful conciliation efforts—have been properly undertaken. EEOC, however, is undoubtedly a proper party to this case with respect to the contractual issues raised by Jersey Central's complaint, and its status as a party probably means

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

---

that it will be bound by the judgment as a matter of *res judicata*. See ALI, *Restatement of Judgments*, §77 (1942). And see Pet. App. 62.

Since the judgment of the court of appeals would at least arguably preclude EEOC from filing its own complaint against Jersey Central on the theory advanced in the petition for a writ of certiorari, we believe that the Commission may properly invoke this Court's certiorari jurisdiction notwithstanding the unusual procedural posture of this case.